Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

Pedro Guzman

Petitioner,

v.

Alberto Gonzales, United States Attorney General,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Salvador Colon
Counsel of Record
for Petitioner
Salvador Colon, P.C
3213 Houston Ave
Houston, Texas 77009
713-863-7909

QUESTIONS PRESENTED FOR REVIEW

1. Whether the equity test that was re-adjudicated de novo by the Board of Immigration Appeals was proper under the fairly new rules set by the Board of Immigration Appeals and whether it violated the alien's due process right.
2. Whether the Board of Immigration Appeals abused it discretion and improperly followed the test for 212(c) and applied a higher standard to the alien, which would violate the equal protection clause and due process clause.
3. Whether the Board of Immigration Appeals over stepped its boundaries upon reserving the Immigration Judge on discretion as opposed to matters of law.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

Solicitor General. Room 5164, U.S. Dept. of Justice, 950 Pennsylvannia Ave. N.W. 20530-0001.

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Petitioner, Pedro Guzman, respectfully request that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit issued on January 5, 2006. App.1.

CITATION OF THE AGENCY AND COURT ORDERS AND OPINIONS

The United States Court of Appeals opinion is unreported. A-1. *Pedro Guzman v. Alberto Gonzales, U.S. Attorney General*, No. 05-20175 (5th Cir. January 5, 2006).

The United States District Court for the Southern District of Texas opinion is unreported. A-5; *Pedro Guzman v. John Ashcroft*, Cause No. H-04-1551

The Board of Immigration Appeals decision is unreported. A-16; *In re Pedro Guzman, A91 217 945.*

The Immigration Judge decision is unreported. A-21.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied petitioner's petition for review on January 5, 2006. A-1.

This Court has jurisdiction to review the final judgment of the Court of Appeals by writ of certiorari. 28 U.S.C. § 1254(1); See also 8 U.S.C. § 1252(a)(1), INA § 242(a)(1); 28 U.S.C. § 2350(a).

APPLICABLE LAW

The following statutes and regulations set forth the substantive law for 212(c) relief necessary for the Court's consideration of this case.

8 U.S.C. § 1182(c) (repealed) provided: aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven years, may be admitted in the discretion of the Attorney General.

***INS v. St. Cyr*, 533 U.S. 289 (2001)** held habeas corpus review was proper that a deportable alien had a right to challenge the Executive's failure to exercise the discretion authorized by the law. Pursuant to *St. Cyr*, 212(c) relief was maintained for those individuals who made a plea in their criminal cases before April 1, 1997.

***Matter of Marin*, 16 I & N Dec. 581 (BIA 1978)** held that in order to determine discretionary relief under section 212(c) of the act, one needs to do a balancing test of the adverse factors against the social and humane considerations presented. An applicant who has been convicted of a serious drug offense must demonstrate unusual or outstanding countervailing equities before a favorable exercise of discretion will be considered. Rehabilitation will also be required for one who has a criminal record. However, there is no irrebuttable presumption that a confined or recently convicted alien can never establish that rehabilitation has occurred or that relief should be granted.

STATEMENT OF THE CASE

A. Jurisdiction Below

The United States Court of Appeals for the Fifth Circuit was the federal court of first instance in this case. A-1. It had jurisdiction to review the United States District Court for the Southern District of Texas' decision denying the Petitioner's petition for Habeas Corpus. App 5. The United States District Court for the Southern District of Texas has jurisdiction to review the Board of Immigration Appeals decision reversing the Immigration Judge's decision under section 2241 of the USC title 28.[1] App.16.

[1] Real ID Act passed by Congress in 2005 transferred all jurisdictions from the United States District Court to the United States Circuit Courts, which became effective on May 21, 2005.

B. Credibility

The facts regarding this case are not in dispute.

C. The Actors

Petitioner, Pedro Guzman, is a Mexican national. App.1 He became a Lawful Permanent Resident in 1990. A-1 He is the father of four United States citizen girls and one Lawful Permanent Resident daughter. A-5. He continues to be married to his wife, who is also a Lawful Permanent Resident. A-5. His father is a lawful Permanent Resident. A-5. He also has five US citizen grandchildren; one whom he fully supports.

D. The Acts

On July 13, 1992, Mr. Guzman pled guilty to sexual assault of a minor. A-1. Mr. Guzman admitted to having sexual relations with his underage niece, Miriam. He successfully served 10 years probation. He completed a polygraph test and all necessary classes required and ordered by the State Judge and probation officer[2].

Thereafter, the Immigration and Customs Enforcement ("ICE") placed Petitioner in removal proceedings, to which he filed for 212 (c) relief. Since the relations with the minor child, his niece, Mr. Guzman, has not seen his niece in question. A-5. According to Petitioner's wife, Miriam has moved on with her life, she is now married with children living in the United States.

Mr. Guzman has not committed any other crime and has become a better husband and father. He supports his family emotionally and financially. Mrs. Guzman, his wife, is employed; however, she cannot support herself and her children on her salary solely. Mr. Guzman has been

[2] The polygraph test was submitted and showed that he was no longer in any way having relations with Miriam or any minor since the event with Miriam.

employed with the same employer for approximately 25 years. A-5.

Mr. Guzman has some medical problems, for which his medical insurance covers his expenses. He has a couple of daughters living with him. One of which has a son, whom he also helps to take care of. His youngest daughter is in high school and aspires to get a college degree.

He owns a lot of property with a mobile home on it. A-5

E. The Adjudications

The fifth circuit decided that the United States District Court for the Southern District of Texas was correct in dismissing Petitioner's-Appellant's habeas petition for lack of subject matter jurisdiction. App.1 The fifth circuit stated that the Petitioner-Appellant did not state any cognizable constitutional or statutory claim in his petition. A-1.

The United States District Court for Southern District for Texas decided that a dismissal of the Petitioner's-Appellant's habeas petition was warranted because of lack of jurisdiction. A-5. They stated that the Petitioner did not state any cognizable constitutional or statutory claim and that habeas corpus jurisdiction does not encompass discretionary decisions.

The Board of Immigration Appeals ("Board") reversed the Immigration Judge's decision stating that it did not find that Petitioner's equities outweighed the gravity of the offense. A-16.

The Immigration Judge granted Petitioner's application for 212(c). The Immigration Judge stated that the gravity of the offense requires a showing of unusual and outstanding equities. The Judge balanced the equities and found the family ties that the Petitioner has in the United States is an unusual and outstanding equity in his favor. The Judge also found that the Petitioner's employment history, the same employer and never being unemployed is an

unusual and outstanding equity. The Judge found that his years of residency did not meet the unusual and outstanding equity. The Judge also noted positive factors were that he had paid his taxes, and owned property.

The Immigration Judge then reviewed the hardship. The petitioner has had a heart attack and has had a stint implant. He does and is suppose to see a doctor every three months and does not believe he would be able to have the proper medical care needed if he were deported to Mexico.

Petitioner's wife also noted that she could not afford to support herself and her children alone. Their youngest daughter would also like to attend college, but without his support, she may not be able to afford it. The Judge also noted that there would be a hardship to the family ties.

The Judge did take notice that the Petitioner did not think that his involvement with a minor was wrong, mainly because he got involved with his wife when they both were young. However, upon the conviction and his classes, he has never committed another crime, nor has he been involved with another minor.

The Judge decided after viewing the evidence in its totality, that the Petitioner, Mr. Guzman, tipped the equities in his favor.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

A. Standard of Review

This Court has held in *INS v. St. Cyr*, 533 U.S. 289 (2001) that habeas corpus review was proper that a deportable alien had a right to challenge the Executive's failure to exercise the discretion authorized by the law. The exercise of the District Court's habeas corpus jurisdiction to answer a pure question of law in this case is entirely consistent with the exercise of such jurisdiction in *Accardi*. Pursuant to *St. Cyr*, 212(c) relief was maintained for those individuals who made a plea in their criminal cases before April 1, 1997.

Former section 212(c) the Immigration and Nationality Act, codified at 8 U.S.C. § 1182(c) (repealed), is discretionary relief and provided: aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven years, may be admitted in the discretion of the Attorney General.

Under *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), the Board held that in order to determine discretionary relief under section 212(c) of the act, one needs to do a balancing test of the adverse factors against the social and humane considerations presented. An applicant who has been convicted of a serious drug offense must demonstrate unusual or outstanding countervailing equities before a favorable exercise of discretion will be considered. Rehabilitation will also be required for one who has a criminal record. However, there is no irrebuttable presumption that a confined or recently convicted alien can never establish that rehabilitation has occurred or that relief should be granted. The Immigration Judge used this standard, however, she used a slightly higher standard than what is required in *Matter of Marin*, the Immigration Judge used an unusual and outstanding equities standard, whereas *Matter of Marin* sets out the unusual or outstanding equities standard. *Supra*. Combing the unusual and outstanding equities requirement creates a higher standard than what the Board has set out. However, the Board reversed the Immigration Judge's decision even with this higher standard, showing that the Board did not consider all the facts involved. *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978).

The Board reinforced the element of rehabilitation requirement in *Matter of Buscemi*, 19 I & N Dec. 581 (BIA 1988). The Board did not consider that the Petitioner has not committed another crime since this conviction. The Board focused on the negative factor about how the Petitioner did not realize that having sex with a minor was wrong at the

time of the event back in 1992. The Board completely ignored the fact that the Petitioner has not committed another such act. He took a polygraph test, to which the results returned indicated that he has not committed such an act again. Mr. Guzman was also required to take certain classes during his probation period. He completed all his classes and he has become a better person. The Board has completely ignored the Petitioner's rehabilitation, a very important fact to be considered in determining 212(c) relief. *Matter of Buscemi,* 19 I & N Dec. 581 (BIA 1988); *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978).

Pursuant to 8 USC § 1003.1(d)(3)(1), the Board my not conduct de novo review of findings of fact. The Board has overstepped its jurisdiction when they reversed the Immigration Judge in the present case. The Board did conduct a de novo review of the finding of fact. The Immigration Judge considered all the facts presented and made a determination in the present case. The Board, reversed the Immigration Judge by determining that the rehabilitation fact was nonexistent, that the petitioner has not committed another crime, that he has established unusual and outstanding equities. The Petitioner established the higher standard that Immigration Judge imposed and yet the Board reversed by doing a de novo review of not a discretionary issue, but by a matter of law.

Pursuant to *Matter of Edwards*, 20 I & N Dec. 191 (BIA), the Board held that 212(c) application involving criminal aliens must be evaluated on a case by cases basis with rehabilitation as a factor to be considered in the exercise of discretion. Depending on the severity of the crime determines the equity standard. Applying unusual or outstanding equities is the appropriate standard for serious crimes. Accordingly, unusual or outstanding equities can only be made after a complete review of the favorable factors. Additionally, a threshold test is inappropriate when determining the balancing of the equities. When the exercise of discretion is applied, consideration of all the facts and

circumstances involved, along with balancing the humane and social factors against the adverse factors. Some favorable factors include: family ties, duration of residence, hardship to the applicant and family, employment history, military service, community service, property, and rehabilitation. Some adverse factors include: additional crimes or violations, nature of crime and severity, and bad character of the applicant. *Matter of Edwards*, 20 I & N Dec. 191 (BIA) *and Matter of Marin*, 16 I & N Dec. 581 (BIA 1978).

However, in the present case the Board disregarded their own caselaw and standard. It is true that 212(c) is evaluated on a case by case basis. Nonetheless, disregarding law is not reversing on a matter of discretion.[3] *See e.g. Diaz-Resendez v. INS*, 960 F. 2d 493 (5th Cir. 1992).

Additionally, when construing statutes that have criminal applications, the rule of lenity is to be used. *Leocal v. John Ashcroft, Attorney General*, 543 U.S. 1 (2004). The rule of lenity states that if there is ambiguity in the language of a statute concerning multiple punishments, ambiguity should be resolved in the favor lenity, or the Petitioner. Under the rule of lenity, the petitioner meets the requirements for 212(c) relief and even met a higher standard held by the Immigration Judge.

There are indicators that the Board erred in reversing the Immigration Judge which is an abuse of discretion that violates due process and equal protection. Denials of discretionary relief under section 212(c) are upheld unless it

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[3] *Matter of Blake*, 23 I & N Dec 722 (BIA 2005), has held that an alien who has a conviction for sexual assault of a minor is ineligible for 212(c) relief because there is no corresponding ground of excludability. This case was not in effect until just recently and this issue was not raised by the government or any party during the proceedings. Thus the issue is waived and moot. Should this issue be a reason for denial of the writ of certiorari, we respectfully request that the case be remanded to raise and argue the constitutionality of the case.

is arbitrary, irrational, or contrary to law. *Zamora-Morel v. INS*, 905 F.2d 838(5th Cir. 1990). Upon investigating whether a discretionary decision by the Board was arbitrary, irrational, or not in accordance with the law, the Court engages in a substantial inquiry, an in-depth review of the discretionary agency action. See *Diaz-Resendez v. INS*, 960 F. 2d 493 (5th Cir. 1992) *citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

B. Burden of Proof

The burden of proof is on the Petitioner, or applicant to show that he has tipped the equities in his favor. Depending on the severity of the crime, suggests the standard that he must reach. When one has a serious offense, such as sexual assault of a minor, the standard is much higher. The burden of proof that Mr. Guzman must reach is unusual or outstanding equities to overcome his offense of sexual assault of a minor. He must also show hardship and rehabilitation.

There does not appear to be a clear cut rule on how to balance the equities, nor what would establish unusual or outstanding equities. However, there is case law for guidance. Additionally, 212(c) relief is discretionary relief.

It is also a burden that is not as high as to where no one would be able to tip the
scale in his favor. However, the Board would make one believe that this is the case for such serious crimes. 212(c) relief is suppose to be a second chance for those who made a mistake and have been rehabilitated and show hardship to oneself and spouses, parents and children; along with showing unusual or outstanding equities.

C. Substantial Evidence

The policy of the Court is to generally not grant a writ of certiorari only to apply its limited resources to reviewing fact questions. However, when the substantial evidence standard has been misapprehended or grossly

misapplied this Court will grant certiorari to review. *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998). In the case at bar, the fifth circuit court of appeals failed to conduct an in depth substantial inquiry that was searching and careful of the United States District Court for the Southern District of Texas or the Board of Immigration appeal's decision.

In the case presented as in the *Diaz-Resendez* case, the Board improperly weighed the equities. It is clear that the Board just referred to some factors in passing and failed to consider all the factors. This was a clearly erroneous reversal by the Board and the United States District Court for Southern District of Texas did have jurisdiction over the case because it was a clearly erroneous decision by the Board and was if not a wrongful de novo review of the finding of facts, was clearly an abuse of discretion; thus due process and equal protection.

D. Conclusion

For all these reasons the petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

Salvador Colon
Counsel of Record
for Petitioner
Salvador Colon, P.C.
3213 Houston Ave
Houston, Texas 77009
713-863-7909

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[DATE STAMP]
United States Court of Appeals
Fifth Circuit
January 5,2006
Charles R. Fulbruge III
Clerk

No. 05-20175
(Summary Calendar)

PEDRO GUZMAN
Petitioner – Appellant

v.

ALBERTO GONZALES, U S ATTORNEY GENERAL
Respondent – Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. H-04-1551

Before SMITH, GARZA, AND PRADO, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant appeals the district court's order dismissing his habeas petition for lack of subject matter

*Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

jurisdiction. We AFFIRM.

I

Petitioner-Appellant, a Mexican national, was granted lawful permanent resident status in 1990. On July 13, 1992, he pled guilty to sexually assaulting a child, his niece, in the second degree and was placed on probation for ten years. Based on this conviction, the Department of Homeland Security charged him with removability for having been convicted of an aggravated felony under section 237 (a) (2) (A) (iii) of the Immigration and Naturalization Act ("Act"), 8 U.S.C. § 1227 (a) (2) (A) (iii) . *See* section 101 (a) (43) (A) of the Act, 8 U.S.C. § 1101 (a) (43) (A) (defining sexual abuse of a minor as an aggravated felony).

Given the serious nature of his crime, Petitioner-Appellant bore the burden of establishing unusual or outstanding equities in order to qualify for a discretionary waiver of inadmissibility under former section 212(c)of the Act, codified at 8 U.S.C. § 1182 (c).[1] *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988). The immigration judge ("IJ") granted Petitioner-Appellant's application for waiver from deportation under section 212(c), finding that he met his burden of demonstrating he deserved the relief as a matter of discretion. The Department of Homeland Security appealed the grant of relief from removal. The Board of Immigration Appeals ("BIA") reversed the IJ's decision and denied the relief because it did not find that Petitioner-Appellant's family ties and his employment history outweighed the gravity of Petitioner-Appellant's offense. The BIA also did not agree with the IJ that Petitioner-Appellant had

[1] Although repealed in 1996, section 212 (c) relief remains available for convictions occurring prior to the repeal of that section. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

established rehabilitation as a positive equity, noting that the Petitioner-Appellant testified that he would have continued having sexual relations with his niece, a minor at the time, if she had not reported the acts at school. In addition, the BIA noted that Petitioner-Appellant did not think it was "such a great crime" to have had sexual relations with his niece since he had become sexually involved with his wife when they both were minors. Thus, the BIA concluded that Petitioner-Appellant's statements "indicate[d] that [Guzman] does not appreciate either the wrongfulness of adults having sex with children or of incestuous sexual relationships." Hence, the BIA vacated the IJ's decision granting Petitioner-Appellant the waiver and ordered Petitioner-Appellant's removal to Mexico.

Petitioner-Appellant filed a district court habeas corpus suit challenging the decision of the BIA denying his application for discretionary relief from removal. He argued that he was entitled to habeas relief based on the BIA's improper balancing of the equities in reversing the IJ's decision. The district court granted the government's motion to dismiss for lack of subject matter jurisdiction under 28 U.S.C. § 2241 (c) (3) because "Guzman failed to state any cognizable constitutional or statutory claim in his petition."

II

We review *de novo* the district court's legal determinations regarding jurisdiction. *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 302 (5th Cir. 1999).

Section 2241(c) (3) may be used broadly to challenge orders of deportation as being in violation of the Constitution or laws or treaties of the United States. Thus, federal courts retain habeas jurisdiction to review statutory and constitutional claims. However, section 2241 (c) (3) does not

confer jurisdiction to review denials of discretionary relief by an IJ or the BIA. *Bravo v. Ashcroft*, 341 F.3d 590, 592 (5th Cir. 2003).

We find that Petitioner-Appellant fails to state any cognizable constitutional or statutory claim in his petition. In addition, as former § 212(c) of the Act is a discretionary form of relief, we agree that the district court did not have habeas jurisdiction to review the BIA's decision to deny Petitioner-Appellant relief made available under that section.

Thus, we AFFIRM the district court's dismissal of Petitioner-Appellant's habeas petition for lack of subject matter jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[DATE STAMP]
United States Courts
Southern District of Texas
ENTERED
JAN 24 2005
Michael M. Milby, Clerk of Court

PEDRO GUZMAN,
Petitioner,

vs. CIVIL ACTION NO. H-04-1551

JOHN ASHCROFT,
Respondent.

FINAL JUDGMENT

For the reasons stated in the Court's Order granting Respondent John Ashcroft's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Instrument No.), signed on the 21st day of January, 2005, this action is **DISMISSED**.

THIS IS A FINAL JUDGMENT.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED this the 21st day of January, 2005, at Houston, Texas.

/s/ Vanessa D. Gilmore
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[DATE STAMP]
United States Courts
Southern District of Texas
ENTERED
JAN 24 2005
Michael M. Milby, Clerk of Court

PEDRO GUZMAN,
Petitioner,

vs. CIVIL ACTION NO. H-04-1551

JOHN ASHCROFT,
Respondent.

ORDER

Pending before the Court is Respondent John Ashcroft's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Instrument No. 5), filed on July 23, 2004.

I.

Respondent John Ashcroft ("Respondent"), Attorney General of the United States, brings this action pursuant to Rule 12(b)(l) of the Federal Rules of Civil Procedure to dismiss this habeas corpus petition for lack of subject matter jurisdiction. (Instrument No. 5, at 1). Respondent contends that the scope of habeas corpus review of a removal order does not allow a district court to review the decisions of the BIA, denying applications for discretionary relief from removal on the merits. (Instrument No. 5, at 1).

Petitioner Pedro Guzman ("Petitioner") is a forty-six year old male. Petitioner claims that he is a native-citizen of Mexico. (Instrument No. 1, at 1). Mr. Guzman also claims that he has resided in the U.S. since 1979 or 1980, but that he became a Lawful Permanent Resident on, January 24, 1990. (Instrument No. 1, at 1).

On July 13, 1992, Petitioner was convicted of sexual assault of a child and received ten years probation. (Instrument No. 1, at 1). In July of 2002, Petitioner completed his probation. (Instrument No. 1, Exhibit 3, at 38). The Department of Homeland Security ("DHS") initiated proceedings to deport Petitioner on June 24, 2003, for his 1992 conviction. (Instrument No. 1, at 2). On November 3, 2003, the Immigration Judge ("IJ"), Susan Yarbrough, granted Petitioner's application for waiver from deportation under the former section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c) as a matter of law and discretion. (Instrument No. 1, Exhibit 4, at 11). The Government appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). (Instrument No. 5, at 1). On March 22, 2004, the BIA reversed the IJ's decision and ordered Mr. Guzman's removal to Mexico. (Instrument No. 1, Exhibit 1, at 3). Mr. Guzman filed a Petition for Writ of Habeas Corpus (Instrument No. 1), on April 14, 2004.

In Mr. Guzman's petition, he claims that jurisdiction is proper in this Court pursuant to Article I, Section 9, Clause 2 of the United States Constitution, 28 U.S.C. § 2241(c) (power to grant writ), 28 U.S.C. § 1651 (writs) and 28 U.S.C. § 1331 (federal question jurisdiction). (Instrument No. 1, at 3). Guzman also asserts that the authority to grant the requested injunctive relief is conferred by 26 U.S.C. § 2201(a). (Id., at 3).

Mr. Guzman claims that venue is proper in this Court

pursuant to 28 U.S.C. § 1391(e). "in that this is an action against officers and agencies of the United States in their official capacities, brought in the District where a Defendant resides and where a substantial part of the events or omissions giving rise to Plaintiff's claim occurred." (Id., at 4). Guzman resides in Houston, Texas, and his deportation hearing was conducted in the Immigration Court in Houston, Texas. (Id., at. 4).

Petitioner claims that he is entitled to habeas relief based on the BIA's improper balancing of the equities in reversing the IJ's decision to waive Petitioner's deportation under former section 212(c) of the INA. On November 5, 2003, Pedro Guzman appeared before the IJ, with his attorney. At the IJ hearing, Mr. Guzman, his wife, his brother, and one of his daughters testified on his behalf. Mr. Guzman testified that he had been with his wife since 1977, but that their common law marriage was formally declared in 1991. (Instrument No. 1, Exhibit 1, at 14). Petitioner and his wife have five daughters. (Id., at 14). Four of their daughters were born in the United States and are U.S. citizens. (Id., at 14). The daughter that was not born in the United States is a Lawful Permanent Resident. (Id., at 15). Petitioner stated that he has four brothers residing in the United States and two sisters in Mexico. (Id., at 15). One of his brothers is a citizen and the other three are residents. (Id., at 15). Mr. Guzman's father also lives in the United States and is a Lawful Permanent Resident. (Id., at 16). However, Mr. Guzman's mother resides in Mexico and visits every few months using a visa. (Id., at 16).

Mr. Guzman testified that he has been a Lawful Permanent Resident since 1990, when he was thirty years old. (Id., at 16-17). Mr. Guzman's wife is also a Lawful Permanent Resident. (Id., at 21). Mr. Guzman stated that he has worked for the Methodist Hospital System for the past

twenty-three years and that he currently works in the department of surgery as a nurse's assistant. (Id., at 18). Mrs. Guzman is also employed at Methodist Hospital in the housekeeping department. (Id., at 21). Petitioner testified that he has not been unemployed since he has been in the U.S. and that he and his family have never collected food stamps or received public assistance. (Id., at 19). Petitioner and his family live in a mobile home on a lot that he owns in Fort Bend County. (Id., at 19). Petitioner and his family have lived in Fort Bend County for the past eight or nine years, but before that they lived in various areas around Houston, including an apartment on Braeswood. (Id., at 19). Currently, two of Petitioner's daughters and one grandson live with Petitioner and his wife. (Id., at 21).

Petitioner stated that his deportation would impose a hardship on he and his family. (Id., at 20). Petitioner stated that he visits the doctor every three months for his heart condition. (Id., at 21-23). The medical insurance that Petitioner receives from his job enables him to seek medical attention that he feels he would not be able to afford if he were to be deported. (Id., at 21-23). Petitioner also stated that a hardship would be imposed on his wife because her salary alone is not enough to take care of the family and she would not be able to afford to send their daughter to college. (Id., at 22).

Mr. Guzman testified that he pled guilty to sexual assault of a child in July of 1992 as a result of having a sexual relationship with his wife's niece who was fifteen or sixteen at the time. (Id., at 1). Petitioner stated that Miriam Gill, his wife's niece, came to live with he and his wife after her father was killed at a bar. (Id., at 24-31). Petitioner claims that he and Miriam Gill had established a relationship and had talked about having sex before it actually happened. (Id., at 31). He stated that the two of them had sex two or

three times. (Id., at 31-32). It occurred once at his home and the other times at a motel where he would take his other girlfriends. (Id., at 23-31). Petitioner contends that at the time he had sex with Miriam Gill he did not think that it was a crime because he was in a relationship with his wife when she was sixteen. (Id., at 38-39). However, petitioner was also sixteen or seventeen at the time. (Id., at 38-39). Mr. Guzman was thirty when he had sex with Miriam Gill. (Id., at 39). Petitioner claims that he did not violate his probation and has not had any contact with Miriam Gill since he pled guilty. (Id., at 26).

On November 5, 2003, the Immigration Judge granted Mr. Guzman's application for relief from removal under the former § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). (Id., at 2). Section 212(c) of the INA was repealed in 1996. However, the United States Supreme Court has held that aliens that were convicted of crimes prior to its repeal may apply for § 212(c) relief. *INS v. St. Cyr*, 533 U.S. 289 (2001). The Department of Homeland Security appealed the grant of relief from removal, and the Board of Immigration Appeals ("BIA") reversed the Immigration Judge's decision. (Id., at 2). Guzman is now the subject of a final order of deportation entered by the BIA on January 22, 2004. (Id., at 2). Guzman asserts that he has exhausted his administrative remedies. (Id., at 5).

Pending before the Court is Respondent John Ashcroft's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Instrument No. 5), filed on July 23, 2004. The government contends that Mr. Guzman's Petition for Writ of Habeas Corpus (Instrument No. 1) should be dismissed because "the limited scope of habeas corpus review of deportation orders does not permit review of the denial of discretionary relief from deportation on the merits by the

Attorney General..." (Instrument No. 5, at 3). Petitioner argues that the BIA's decision is clearly erroneous as a matter of law. (Instrument No. 1, at 8). Petitioner also claims that the BIA decision is an unwarranted intrusion into the powers of Congress, which held that § 212 relief is available to aliens such as Guzman who have been Lawful Permanent Residents with an unrelinquished lawful domicile in the U.S. for seven years or more. (Instrument No. 1, at 8). Furthermore, Guzman claims that the BIA improperly found that his equities did not outweigh his conviction and the circumstances surrounding it. (Id., at 1-8). Finally, Guzman claims that the BIA classified their decision as discretionary, but that in reality it is a decision as to matters of law. (Id., at 8).

II.

"A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *See Home Builders Ass 'n of Miss. Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). A district court may dismiss an action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) on any one of three separate bases: (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Ramming v. U.S.*, 281 F.3d 158 (5th Cir. 2001) (citing *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996). In examining a Rule 12(b)(1) motion, the court is empowered to consider matters of fact which are in dispute. *See Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). When the court's subject matter jurisdiction is challenged, the party asserting jurisdiction bears the burden of establishing it. See *Gaar v. Quirk*, 86 F.3d 451, 453 (5th Cir. 1996). Any

uncontroverted facts in the complaint must, however, be accepted as true. *See Gaubert v. United States*, 885 F.2d 1284, 1285 (5th Cir. 1989), *rev'd on other grounds*, 111 S.Ct. 1267 (1991) (citing *Gibbs v. Buck*, 307 U.S. 66 (1939)). Moreover, the Court must construe the complaint broadly and liberally. *See Gaubert*, 885 F.2d at 1285 (citing *Norton v. Larney*, 266 U.S. 511 (1925).

A motion to dismiss under rule 12(b)(1) for lack of subject matter jurisdiction should be granted, only if it appears that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *See id.* (citing *Home Builders Ass'n of Miss.*, 143 F.3d at 1010).

III.

The government contends that this Court lacks subject matter jurisdiction because the scope of habeas corpus review does not encompass decisions of the BIA, denying discretionary relief from deportation on the merits. (Instrument No. 5, at 1). Petitioner claims, however, that jurisdiction is proper in this Court to exercise habeas corpus review under 28 U.S.C. § 2241(c)(3). (Instrument No. 1 , at 3). According to 28 U.S.C. § 2241(c)(3), the writ of habeas corpus shall not extend to a prisoner unless he is in custody in violation of the Constitution or laws or treaties of the United States. As such, federal courts retain habeas jurisdiction to review statutory and constitutional claims, but there is no jurisdiction to review denials of discretionary relief by an IJ or the BIA. *Bravo v. Ashcroft*, 341 F.3d 590 (5th Cir. 2003). *See also Toscano-Gil v. Trominski*, 210 F.3d 470 (5th Cir. 2000) (holding that statement of a cognizable constitutional claim is a prerequisite for § 2241 claims).

Petitioner argues that the BIA's decision is clearly erroneous as a matter of law. (Instrument No. 1, at 8).

Petitioner also claims that the BIA decision is an unwarranted intrusion into the powers of Congress, which held that § 212 relief is available to aliens such as Guzman who have been Lawful Permanent Residents with an unrelinquished lawful domicile in the U.S. for seven years or more. (Instrument No. 1, at 8). Petitioner further claims that the BIA improperly found that his equities did not outweigh his conviction and the circumstances surrounding it. (Id., at 1-8). Finally, Petitioner claims that the BIA classified their decision as discretionary, but in reality it is a decision as to matters of law. (Id., at 8).

Petitioner has failed to state any cognizable constitutional or statutory claims in his petition. Furthermore, Petitioner applied for discretionary waiver of relief under the former § 212(c) of the Immigration and Nationality Act. The former § 212(c) of the INA allowed the Attorney General the discretion to waive the deportation of aliens, convicted of most offenses if they were not actually incarcerated for five years or more. As former § 212(c) of the INA is a discretionary form of relief, this Court does not have habeas jurisdiction to review the BLA's decision to deny Petitioner discretionary relief made available under former § 212(c). Accordingly, the Court lacks subject matter jurisdiction to review this case under 28 U.S.C. § 2241 (c)(3).

Even if habeas corpus review were available in this case, 8 U.S.C. § 1252(a)(2)(C), which is titled, "Orders against criminal aliens," precludes this court from reviewing any final order of removal against an alien who is removable by reason of having committed certain criminal offenses. It provides,

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any

> final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(I) of this title.

8 U.S.C. § 1252(a)(2)(C) (2004).

Among these criminal offenses, section 2227(a)(2)(A)(iii). titled "Aggravated Felons," provides that any alien who is convicted of an aggravated felony at any time after admission is deportable. Petitioner admits that the offense for which he was convicted is an aggravated felony according to § 101(a)(43)(A) of the INA, 8 U.S.C. § 1101(a)(43)(A). (Instrument No. 1, at 5). Petitioner also acknowledges that he is deportable under 8 U.S.C. § 1227(a)(2)(C). (Id., at 5). Similarly, § 1182(a)(2) states that, "... any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude... is inadmissible." 8 U.S.C. § 1182(a)(2). Mr. Guzman pled guilty to and was convicted of sexual assault of a child. (Instrument 1, at 1). Sexual assault of a child is a crime involving moral turpitude. As such, this Court finds that Petitioner committed a criminal offense covered in sections 1182(a)(2) and 1227(a)(2)(C), which are specifically enumerated in 8 U.S.C. § 1252(a)(2)(C). Accordingly, because the BIA decision is a final order of removal, which is precluded from judicial review by 8 U.S.C. § 1252(a)(2)(C), this case is not subject to judicial review by this Court. Respondent's Motion to Dismiss for Lack of

Subject Matter Jurisdiction (Instrument No. 5) is GRANTED.

IV.

IT IS HEREBY ORDERED that this Court lacks jurisdiction to review this case. Accordingly, Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Instrument No. 5) is GRANTED.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 21st day of January, 2005, at Houston, Texas.

/s/ Vanessa D. Gilmore
UNITED STATES DISTRICT JUDGE

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A91 217 945 - Houston Date: MAR 22 2004
In re: PEDRO GUZMAN

IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT: Ali M. Onan, Esquire
ON BEHALF OF DHS: Erica J. McGuirk
Assistant Chief Counsel

CHARGE:
Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony under section 101 (a)(43)(A), I&N Act [8 U.S.C. § 1101(a)(43)(A)]

APPLICATION: Waiver of inadmissibility

In a decision dated November 3, 2003, an Immigration Judge found the respondent removable as charged and granted his application for a waiver of inadmissibility under section 212(c) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(c); the Immigration Judge terminated proceedings.[1] The Department of Homeland Security (DHS or Department, formerly the

[1]Although section 212(c) of the Act has been repealed by Congress, the United States Supreme Court has held that aliens such as the respondent who pled guilty or nolo contendere to an otherwise qualifying crime prior to AEDPA's and IIRIRA's enactment dates are not barred from applying for 212(c) relief. *See INS v. St. Cyr*, 533 U.S. 289 (2001).

Immigration and Naturalization Service) has appealed this decision. The appeal will be sustained.

The respondent, a native and citizen of Mexico, was granted lawful permanent resident status in 1990. On July 13, 1992, he pled guilty to sexually assaulting a child in the second degree and was placed on probation for 10 years (Exh. 2).[2] Based on this conviction, the DHS charged the respondent with removability for having been convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii). *See* section 101 (a)(43)(A) of the Act, 8 U.S.C. § 1101 (a)(43)(A) (defining sexual abuse of a minor as an aggravated felony).

On appeal, the Department argues that the Immigration Judge erred both as a matter of law and discretion. With regard to statutory eligibility, the Department asserts that the respondent is not eligible for a waiver of inadmissibility because section 212(c) can only be granted to aliens charged with grounds of deportation under section 237 of the Act where a comparable ground of exclusion exists. Since sexual abuse of a minor under section 101(A)(43)(A) of the Act does not have a comparable ground of exclusion under section 212 of the Act, the Immigration Judge erred in allowing the respondent to apply for a waiver under section 212(c). Even assuming statutory eligibility, however, the Department asserts that the Immigration Judge erred in finding that the respondent established unusual or outstanding equities which would outweigh the negative impact of his criminal conviction such that he merits a grant of relief as a matter of discretion. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). As we agree

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[2] As noted by the Immigration Judge, the respondent's probation has been modified on two occasions (I.J. at 3; Exh. 2).

with the DHS that the respondent has failed to establish that he merits a grant of relief as a matter of discretion, we decline to address his statutory eligibility.

We first note that we agree with the Immigration Judge's determination that the respondent's conviction requires that he establish unusual or outstanding equities in order to qualify for a discretionary waiver of inadmissibility. *See Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988) (stating that the need to show unusual or outstanding equities in a 212(c) case may be mandated because of a single serious crime); *see also Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991). However, we do not agree that the respondent's family ties and his employment history, which the Immigration Judge found to constitute outstanding equities, outweigh the gravity of the respondent's offense (I.J. at 10). *See Matter of Marin,* 16 I&N Dec. 581 (BIA 1978) (setting forth the positive and negative factors to be considered in assessing eligibility for a section 212(c) waiver). *See also Diaz-Resendez v. INS*, 960 F.2d 493 (5th Cir. 1992) (citing *Matter of Marin, supra*).

The respondent has been a lawful permanent resident since 1990 and has been employed steadily for the last 23 years here. Clearly, the respondent also has significant family ties here, both nuclear and extended, which we consider an outstanding equity. *See Diaz-Resendez, supra.* The respondent has a wife, five children, five grandchildren, his father, and four siblings who reside in the United States. It is evident from the record that the respondent's family would suffer emotional and financial hardship if the respondent were removed to Mexico. However, is assessing the nature of the respondent's conviction and the circumstances surrounding it, we cannot conclude that these equities outweigh the negative impact of the respondent's crime.

The respondent admitted that he statutorily raped his niece two or three times (Tr. at 31,35). The respondent's wife testified that her niece, age 14 or 15, came to live with their family when the niece's father was killed and there was no one else to take her in (Tr. at 42-43, 50). The respondent indicated that the niece acted provocatively and that he had sex with her at his home and then later took her to a hotel (Tr. at 23, 32-34). Although the respondent testified that the sexual relations were consensual (Tr. at 33-34), the polygraph test which he apparently took indicated that he admitted that his niece told him she did not want to have sex while they were at the hotel (Tr. at 35). Notwithstanding the respondent's numerous family ties here, and his steady employment and long residence here, as well as any other positive equities, such as property ownership, we do not find that the gravity of the respondent's offense is outweighed by the respondent's equities *Matter of Buscemi, supra* (notwithstanding the presence of unusual or outstanding equities, the Board may deny section 212(c) relief because of the serious nature of the alien's criminal conviction).

Furthermore, we do not agree with the Immigration Judge's conclusion that the respondent has established rehabilitation as a positive equity (I.J. at 6, 10). *See Matter of Buscemi, supra* at 635 (noting that rehabilitation is one of the favorable factors to consider in granting 212(c) relief and that applicants with a criminal record will ordinarily be required to make a showing of rehabilitation); *see also Matter of Roberts, supra.* Although the Immigration Judge stated that the respondent's "insight into his crime is not as deep as the Court would hope," the respondent has been crime-free for eleven years and has attended various counseling programs (I.J. at 6). This "post-conviction behavior'" is certainly relevant to the finding of rehabilitation. *See Diaz-Resendez, supra* at 495. However, the respondent also testified that he and his niece would have

continued having sexual relations if she had not reported the acts at school (Tr. at 35). He admitted that he has had other affairs with women during his marriage and that his wife was not aware of this (Tr. at 36-37, 51); according to the respondent, his only error was becoming involved with a minor (Tr. at 36, 39). However, since the respondent indicated that he and his wife became involved as minors, he did not believe his actions with his niece were "such a great crime" (Tr. at 39). These statements indicate that the respondent does not appreciate either the wrongfulness of adults having sex with children or of incestuous sexual relationships. Therefore, we find that rehabilitation has not been established and this factor greatly weighs against granting the respondent a discretionary waiver. Accordingly, the Immigration Judge's decision granting the respondent's application for a waiver of inadmissibility as a matter of discretion will be vacated.

ORDER: The Department of Homeland Security's appeal is sustained.

FURTHER ORDER: The Immigration Judge's decision granting the respondent's application for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), is vacated and the respondent is ordered removed to Mexico.

/s/
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Houston, Texas

File No.: A 91 217 945 November 3, 2003

In the Matter of

PEDRO GUZMAN IN REMOVAL PROCEEDINGS
Respondent

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENT:

ON BEHALF OF DHS:

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 44-year-old married man, and native and citizen of Mexico, who became a permanent resident in January, 1990, almost 14 years when he was approximately 30 years of age. Respondent has appeared with counsel, admitted the factual allegations in the Notice to Appear, and conceded removability, based on the admissions and concession of counsel, and the evidence submitted by the Government and I find the respondent to be removable as charged under Section 237(a)(2)(A)(3) of the Act.

The respondent is in proceedings because on July 13, 1992, he pled guilty in the State District Court for sexual assault of a child and was sentenced to 10 years probation

for that crime. For relief from removal, the respondent has filed an application for a waiver under Section 212(c). The Court has examined the documentary evidence and listened to the testimony in light of the factors set forth by the Board in *Matter of Marin*. The respondent has presented his own testimony as well as that of his wife, one of his daughters, and one of his brothers. The Court finds all the witnesses to be credible.

The circumstances leading up to respondent's arrest and guilty plea are primarily set forth in Exhibit 3, Tab B, which is an account of which respondent gave to a polygraph examiner after the examine was directed by his probation officer in 1999. Reading the polygraph examination results as a whole, it appears that respondent's 14 or 15-year-old niece came to live with respondent, his wife, and five daughters in approximately 1992, after the nieces father was killed in a bar in the United States. The niece, Miriam Gill, had been brought to the United States by her father. Miriam's mother had remained in Mexico, and Miriam's father had apparently remarried in the United States. After the father's death, Miriam did not want to go back and live with her birth mother in Mexico and the stepmother in the United States did not want Miriam Gill living with her. Accordingly, Miriam went to live with the respondent, his wife, and their five daughters. About 8 to 12 months prior to that Miriam had developed a close relationship with respondent and his family. After Miriam began living in respondent's household she began engaging in provocative behavior which respondent did not discourage. The Court does not blame the victim for what happened, and instead blames the respondent because he was the adult. In any event, however, Miriam and respondent had sexual relations approimately three times over about the course of about a month. Miriam then reported this to a school authority who called the police and respondent was arrested. As noted earlier, he pled guilty to

sexual assault of a child and was given 10 years probation. Probation was modified once in 1998 seemingly after his probation officer learned that respondent had moved to another nearby county, and the respondent was ordered not to travel outside of either Harris County or Fort Bend County, or to change his residence without permission of a probation officer. The probation order was once again modified in 1999 and this appears to have been to require respondent to register as a sex offender which he duly did and has re-registered every year.

Since the relationship with Miriam the respondent has not seen the girl and respondent's wife reports that Miriam has married and is living at some undetermined location in the United States. Given the gravity of respondent's offense and the somewhat casual attitude he took toward it at the time even though there was, he was almost twice as old as Miriam, the Court believes that this is the kind of offense that requires a showing of unusual and outstanding equities.

Most of respondent's family ties are in the United States. He has been with his permanent resident wife who is 43 since 1977, and they obtained a declaration of their common law marriage in 1991. The respondent also has five daughters. Four of them are U.S. citizens and their ages are 22, 22, 21, and 16. He also has a permanent resident daughter who is 25. The respondent has one U.S. citizen brother and three permanent resident brothers all who live in the Houston area as do respondent's five U.S. citizen grandchildren. The respondent's permanent resident father also lives in the Houston area. In Mexico the respondent has two sisters, a grandmother, and his mother who frequently comes to the United States on a visitor's visa and stays anywhere between two weeks and several months. The Court finds that respondent's family ties in the United States are an

unusual and outstanding equity in his favor. The respondent has been a permanent resident for about 14 years beginning at the age of 30 although he first came to the United States in 1979 or 1980. Although his application says that he has no departures, he does appear to have made several trips to Mexico over the years. The Court finds that residency of 14 years beginning at the age of 30 is not an unusual or outstanding equity.

The respondent has never served in the Armed Forces of the United States. He has never been unemployed and, in fact, since 1980 until the present he has been employed by Methodist Hospital in Houston, Texas. He first worked as a janitor and has more recently been promoted to a patient care assistant in the Department of Surgery. The Court finds that respondent's steady employment history for 23 years is an unusual and outstanding equity in his case. Respondent's property and business ties in the United States consists of a credit union account and his ownership of a lot with a mobile home on it in an adjacent county. The Court finds that this is a positive equity although not an unusual or outstanding one. In his 23 years in the Houston area the respondent has not done anything of value and service to his community. Other evidence of good character is in Exhibit 3, Tab O which are his tax returns for every year from 1996 until the present. The respondent says he filed prior to 1996, but copies were not attached. The Court finds that these tax returns for the past seven years are a positive equity although not an unusual or outstanding one. On the matter of hardship, respondent has had one heart attack and also has had a stint implanted in his chest several years ago. The respondent testified that his job is his insurance. He sees a doctor every three months and does not believe that he would be able to have proper medical care if he were deported to Mexico.

The respondent also testified that his family has

property in his home or in the United States, and he would not want to leave them. As to hardship to his family, respondent's wife works as a housekeeper at Methodist Hospital. If she were to be separated from him she would be all alone. Two of respondent's daughters live at home and the others are married. As to hardship to the five daughters, respondent believes that there would be a special hardship to the youngest, who wants to go to college and could not afford it if the respondent is deported. As for hardship to the four brothers that would be primarily family separation and as to hardship with the permanent resident father, the respondent believes that, that would be largely emotional and because the father is ill with diabetes. Respondent also has five U.S. citizen grandchildren. Respondent fully supports one of them who lives in the house with the child's mother as well as respondent's wife, and one of respondent's other daughters.

On the matter of rehabilitation, the respondent has had no probation violations. He has been crime free for 11 years and he has attended alcoholics anonymous group therapy and all other programs required by his probation officer. The respondent's insight into his crime is not as deep as the Court would hope. The respondent believes that he committed an error in getting involved with a minor. On the other hand, the respondent testified that he and his wife got involved with each other when they were only about 16 or 17 years old and he really did not see much of a problem with his relationship with his niece even though he was twice her age when they had their relationship. Other than traffic tickets, the respondent testified that he has no other criminal record in the United States.

On cross-examination, the respondent testified that the victim came to live with respondent when she was about 15, and that he had sex with her no more than two or three

times. All of these incidents took place over about the course of a month. On the second incident the respondent took the victim to the motel because he did not want to have sex with her in his home. According to respondent she went voluntarily with him to the motel and he did not force her to have sex, although the polygraph exam indicates that she, at least, verbalized no to him. If the victim had not eventually reported the relationship to a teacher, the respondent believes that he and she had attested an agreement to continue with the relationship. The respondent does not know why he got involved with Miriam Gill.

The respondent also mentioned in his polygraph having other girlfriends who he had taken to a motel. The respondent testified that he had two or three girlfriends, but they were not minors and were women closer to his age whom he had met at work. The respondent's wife is unaware of any of those other relationships. After respondent was arrested for the sexual assault on Miriam Gill he and his wife separated for somewhere between three to six months. The wife left respondent, but he asked for her forgiveness and she came back partly because she had forgiven him, and partly because she needed him for support. According to respondent, the wife files her own tax returns. Respondent's probation was successfully terminated in July, 2002.

Respondent presented the testimony of his permanent resident [Text missing or illegible] Guzman, who is 43 years old. She testified that [Text missing or illegible] back together with respondent after a separation because [Text missing or illegible] him and needed him to support her daughters. Mrs. [Text missing or illegible] testified that respondent has been a good father for his [Text missing or illegible] and has good communication with all of them. During [Text missing or illegible] 10 years he has changed a lot and has communicated more [Text missing or illegible]

and had a closer relationship, excuse me, with his wife. [Text missing or illegible] matter of hardship, Ms. Guzman, testified that it would be [Text missing or illegible] to her if respondent were to be deported because they [Text missing or illegible] been together in good and bad, that he counsels and [Text missing or illegible] daughter, that he financially supports his children, [Text missing or illegible] their family is a close one. She also testified that [Text missing or illegible] be hardship to their five daughters especially to the [Text missing or illegible] one who is 16 who is currently depressed and confused [Text missing or illegible] respondent's situation. All five of the daughters love [Text missing or illegible] and support him in his times of difficulty. Ms. [Text missing or illegible] also testified that the one 2-year-old grandchild who [Text missing or illegible] them in the household has shown signs of missing [Text missing or illegible] very much. When respondent was hospitalized twice for [Text missing or illegible] problems, Mrs. Guzman, was at his side in the hospital. [Text missing or illegible] respondent then presented the testimony of his daughter, [Text missing or illegible] a U.S. citizen who is 21 years old and the mother of a [Text missing or illegible] child who lives with Jessica in the respondent's [Text missing or illegible]. Ms. Guzman, remembered respondent's arrest which [Text missing or illegible] when she was about 10 years old. She testified that if respondent were deported it would be a hardship to herself and her sisters because he has always helped him out with everything, has given him advice, had parties with them, taken them out to eat, and has gone to the movies with them. She believes that he has changed in 10 years and that he is more open and emotional. He speaks with more civility and he does not yell at the children anymore. Ms. Guzman, also testified that the whole family needs him not financially, but because they miss him everyday and they want to see him everyday. They love him and he is their father no matter what. Additionally, she

testified that the past is the past. According to Ms. Guzman, respondent and his wife get along somewhat rocky and they argue a lot. Once many years ago the respondent has hit his wife after he had come home drunk and apparently injured her, but that to the witnesses' knowledge has not happened again. According to Ms. Guzman, the respondent picks up his grandson after work feeds him and takes care of him.

The respondent finally presented the testimony of his brother, Paulino Guzman who is a 42-year-old United States citizen married with three children. The brother came to the United States in 1979. All five of the brothers live in the Houston area and get together almost every weekend. On the issues of hardship, Mr. Guzman, testified that there is a very good relationship among the five brothers and that the respondent as the oldest brother is the one who tries to lead and direct the family. In fact, he is the one who they first look to for advice when any problem arise. Mr. Guzman, also believes that there would be hardship to respondent's wife and five daughters if he were to be deported. He believes that his brother has changed quite a bit in the past 10 years, has had no more problems, get along with family and friends, and co-workers, and has bought property, and established himself in the community.

Viewing the evidence in its totality, the Court finds that respondent's unusual and outstanding equities in the United States are his family ties and his employment history. Other positive equities is his property ties in the form of owning a lot and a mobile home on it. His submission of tax returns for many years, the hardship to himself, his wife, and his children if he were to be deported, and proof of genuine rehabilitation. On the matter of rehabilitation, more specifically respondent has been crime free for 11 years, has attended all of his probation programs, has successfully completed probation with no violation, and seems to have

turned his life around. The Court believes that in view of the two outstanding equities which are his family ties and his employment history and the other positive equities which are his property, his tax returns, hardship and rehabilitation that respondent's equities have tipped in his favor and that he has carried his burden of proof.

Accordingly, it is ordered that respondent's application for a waiver under Section 212(c) is granted as a matter of law and discretion, and that these proceedings are terminated.

SUSAN YARBROUGH
Immigration Judge

(2)

Supreme Court, U.S.
FILED
JUL 10 2006
OFFICE OF THE CLERK

No. 05-1255

In the Supreme Court of the United States

PEDRO GUZMAN, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON MARIE IGOE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review the Board of Immigration Appeals' denial of discretionary relief from removal under former 8 U.S.C. 1182(C) (1994).

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In the Supreme Court of the United States

No. 05-1255

PEDRO GUZMAN, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the *Federal Reporter*, but is available at 163 Fed. Appx. 259. The judgment and order of the district court (Pet. App. A6-A15) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. A16-A20) and the immigration judge (Pet. App. A21-A29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2006. The petition for a writ of certiorari was filed on March 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The REAL ID Act of 2005 (REAL ID Act or Act), Pub. L. No. 109-13, Div. B, 119 Stat. 302, became effective on May 11, 2005. Section 106(a) of the REAL ID Act eliminates habeas corpus review of final orders of removal, and prescribes that the sole means of obtaining judicial review of a final order of removal is through a petition for review in the court of appeals pursuant to 8 U.S.C. 1252(a). See REAL ID Act § 106(a)(1)(B), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(5)).

Prior to the REAL ID Act, aliens who had been ordered removed based on their conviction of an aggravated felony were jurisdictionally barred from obtaining direct review of their removal orders in the courts of appeals. See 8 U.S.C. 1252(a)(2)(C). The REAL ID Act amends the law by allowing all aliens who are ordered removed, including aliens whose removal orders are predicated on their conviction of an aggravated felony, to obtain "review of constitutional claims or questions of law" by filing a petition for review in the appropriate court of appeals. REAL ID Act § 106(a)(1)(A)(iii), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)).

The REAL ID Act prescribes that, in habeas cases pending in district court on the date of the Act's enactment, the district court should transfer the case to the appropriate court of appeals and that court should then treat the case as if it were a proceeding on a petition for review. REAL ID Act § 106(b) and (c), 119 Stat. 311. The courts of appeals have similarly concluded that, when a habeas case was pending on *appeal* on the date of the REAL ID Act's enactment, the court of appeals loses jurisdiction over the appeal but the habeas appeal should be converted into a proceeding on a petition for

review and treated as such by the court of appeals. See *Rosales* v. *Bureau of Immigration & Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005), cert. denied, 126 S. Ct. 1055 (2006); *Gittens* v. *Menifee*, 428 F.3d 382 (2d Cir. 2005); *Bonhometre* v. *Gonzales*, 414 F.3d 442 (3d Cir. 2005), cert. denied, 126 S. Ct. 1362 (2006); *Alvarez-Barajas* v. *Gonzales*, 418 F.3d 1050 (9th Cir. 2005).

2. Petitioner is a Mexican citizen who became a lawful permanent resident of the United States in 1990. In July 1992, petitioner pled guilty in state court to sexual assault of a child, his fourteen-year-old niece. The government charged petitioner with being subject to removal based on his conviction of an aggravated felony. Pet. App. A2, A22; see 8 U.S.C. 1227(a)(2)(A)(iii).

Petitioner admitted that he was removable, but sought a waiver of inadmissibility under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994). The immigration judge (IJ) explained that, in light of the gravity of his offense, petitioner was required to demonstrate "unusual and outstanding equities" in order to be eligible for a waiver of inadmissibility under former Section 212(c). Pet. App. A23. The IJ granted petitioner's request for discretionary relief, determining that the equities were sufficiently unusual and outstanding to warrant a favorable exercise of discretion. *Id.* at A28-A29.

The Board of Immigration Appeals (Board) reversed and ordered that petitioner be removed to Mexico. Pet. App. A16-A20. The government argued that the IJ had erred both as a matter of law and as a matter of discretion.[1] Because the Board agreed with the government

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[1] In contending that the IJ had erred as a matter of law, the government argued that petitioner was ineligible for relief from removal under

that the IJ had erred in finding as a matter of discretion that petitioner was entitled to relief under former Section 212(c), the Board did not address the government's contention that the IJ had committed an error of law in resolving petitioner's claim for relief. *Id.* at A17-A18.

The Board explained that, under Board precedent concerning the exercise of discretion under Section 212(c), in light of the seriousness of petitioner's offense, he was required to establish "unusual or outstanding equities" in order to be considered further for relief. Pet. App. A18. The Board concluded that the equities the IJ identified as outstanding did not outweigh the gravity of petitioner's offense. *Ibid.* The Board emphasized that petitioner admitted to having statutorily raped his niece on two or three occasions. The Board explained that, while petitioner claimed that the sexual relations were consensual, petitioner had admitted that his niece had told him on at least one occasion that she did not want to engage in sexual relations. *Id.* at A19. The Board also determined that petitioner had failed to demonstrate rehabilitation as a positive equity, reasoning that petitioner "did not believe his actions with his niece were 'such a great crime'" and that petitioner had stated that he would have continued having sexual relations with his niece if she had not reported the crime to her school. *Id.* at A19-A20. The Board thus concluded that petitioner did "not appreciate either the wrongful-

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former Section 212(c) because Section 212 set forth no ground of exclusion comparable to petitioner's ground of removal (his conviction of sexual assault of a child). See Pet. App. A17. As petitioner notes (Pet. 8 n.3), the Board has since held that an alien is ineligible for relief from removal under former Section 212(c) in that situation. See *In re Blake*, 23 I. & N. Dec. 722 (BIA 2005).

ness of adults having sex with children or of incestuous sexual relationships." *Id.* at A20.

3. On April 14, 2004, petitioner filed a petition for habeas corpus relief in the district court. On January 21, 2005, the district court dismissed the habeas petition for lack of jurisdiction. Pet. App. A5-A15. The court explained that "federal courts retain habeas jurisdiction to review statutory and constitutional claims, but there is no jurisdiction to review denials of discretionary relief by an IJ or the BIA." *Id.* at A12 (citing *Bravo* v. *Ashcroft*, 341 F.3d 590 (5th Cir. 2003)). The court determined that petitioner "failed to state any cognizable constitutional or statutory claims in his petition," and that the court lacked jurisdiction to review the Board's discretionary denial of relief under former Section 212(c). *Id.* at A13.

The court of appeals affirmed. Pet. App. A1-A4. On May 11, 2005, while petitioner's appeal was pending, the REAL ID Act was enacted. Although petitioner's appeal of the dismissal of his habeas petition was pending on the date of the REAL ID Act's enactment, neither petitioner nor the government requested the court of appeals to convert the appeal into a proceeding on a petition for review, see pp. 2-3, *supra*, and the court did not do so. The court instead continued to treat the case as if it were a habeas proceeding. The court agreed with the district court that petitioner had "fail[ed] to state any cognizable constitutional or statutory claim in his [habeas] petition," and that the district court lacked habeas jurisdiction to review the Board's denial of discretionary relief under former Section 212(c). Pet. App. A3-A4.

ARGUMENT

Neither petitioner nor the government requested the court of appeals to convert petitioner's habeas appeal into a proceeding on a petition for review pursuant to the REAL ID Act, and the court of appeals treated the appeal as a habeas appeal. Petitioner does not challenge the court of appeals' treatment of his appeal as a habeas appeal, and that treatment presents no reason for this Court to grant review.

As the court of appeals correctly determined, Pet. App. A3-A4; see *id.* at A12-A13, petitioner raised no constitutional or statutory claim in his habeas petition, but instead sought review of the Board of Immigration Appeals' denial of discretionary relief under former Section 212(c). The court thus found that there was no jurisdiction to review petitioner's claim. If the court of appeals had treated petitioner's habeas appeal as a proceeding on a petition for review, the court would have reached the same conclusion. Under 8 U.S.C. 1252(a)(2)(B)(ii), as amended by the REAL ID Act, "no court shall have jurisdiction to review" any "decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security," such as the discretionary decision whether to grant relief under former Section 212(c).

Although the REAL ID Act sets forth that any such limitations on judicial review do not "preclud[e] review of constitutional claims or questions of law raised upon a petition for review," REAL ID Act § 106(a)(1)(B), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)), petitioner raises no constitutional claim or question of law.

Petitioner acknowledges that, in light of his conviction of sexual assault of a child, he was required under Board precedents to establish "unusual or outstanding equities" to obtain discretionary relief under former Section 212(c). Pet. 7. The Board explicitly applied that standard here. Pet. App. A18. Thus, even assuming, arguendo, that a standard the Board has chosen to articulate in exercising its own discretion under Section 212(c) could present a "question of law" within the meaning of REAL ID Act § 106(a)(1)(B), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)), no such question is presented here.

Petitioner contends that the Board "improperly weighed the equities" (Pet. 10) in denying him discretionary relief. The Board's fact-specific, discretionary determination in that regard, however, raises no "question of law" within the meaning of REAL ID Act § 106(a)(1)(B), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)).

Petitioner incorrectly suggests (Pet. 7) that the Board "completely ignored [his] rehabilitation." The Board expressly acknowledged that petitioner "has been crime-free for eleven years and has attended various counseling programs," Pet. App. A19, but concluded that, while those considerations were "relevant," they failed to outweigh other considerations warranting the denial of Section 212(c) relief, *id.* at A19-A20.

Finally, petitioner erroneously invokes (Pet. 8) the rule of lenity, a rule that bears on the construction of a criminal statute, not the making of a discretionary determination such as the decision whether to award petitioner discretionary relief from removal under former Section 212(c). See, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Ultimately, petitioner disagrees with the

manner in which the Board exercised its discretion, and that disagreement presents no question of law subject to judicial review under REAL ID Act § 106(a)(1)(B), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

JULY 2006